Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DORA SCHRIRO, et al.,

Petitioners,

v.

JOE D. HEATON, et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Amendments of 1985, enacted in response to *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), expressly allowed states to retain budgetary and management flexibility by using compensatory time, in lieu of cash payments, to compensate employees for overtime work. The Amendments included a provision, 29 U.S.C. § 207(c)(5), designed to ensure that state employees will be allowed to *use* that compensatory time. Without considering the Amendments' important Tenth Amendment grounding, the Eighth Circuit ruled in the decision that §207(o)(5) permits Missouri Department of Corrections employees to choose unilaterally and indefinitely to "bank," rather than actually use, compensatory time.

The question presented is:

Did the Eighth Circuit impermissibly eliminate the budgetary and management flexibility Congress conferred on the states in the Fair Labor Standards Amendments of 1985 in holding that §207(o)(5) requires state governments to allow their employees to bank compensatory time, even when that practice may seriously impede states agencies' abilities to perform their functions.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants
(now petitioners)

Dora Schriro, Director, Missouri Department of Corrections, substituted for Dick D. Moore, former Director of the Missouri Department of Corrections, pursuant to Supreme Court Rule 35.3

Missouri Department of Corrections

Appellees
(now respondents)

All appellees are current or former employees of the Missouri Department of Corrections.

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Natilee J. Crammer
Donald L. Daniels
Frank H. Parker Jr.
Robert Smith
Robert D. Norris
Leon D. Maifield
Carmen D. Jenkins
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Willis L. Brooks
Henry Vollmer
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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on December 21, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at *Heaton v. Moore*, 43 F.3d 1176 (8th

Cir. 1994), and is reprinted in the appendix hereto beginning at page A-2. The Order of the district court is unreported and is reprinted in the appendix beginning at page A-20.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 216(d) and 28 U.S.C. § 1331, respondents filed suit in the United States District Court for the Western District of Missouri. Following the filing of cross-motions for summary judgment, the district court granted summary judgment in part for petitioners and in part for respondents, and denied summary judgment in part. The district court granted respondent employees' motion for summary judgment as to all claims concerning petitioners' ability to affirmatively mandate when an employee will use accumulated compensatory time. A-35 to A-38. The District Court certified this portion of its Order as final for appeal pursuant to Fed.R.Civ.P. 54(b). A-18 to A-19.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit from the district court's decision that petitioners could not affirmatively mandate when an employee will use accumulated compensatory time. The Eighth Circuit affirmed this decision of the district court by its opinion of December 21, 1994. A-2 to A-14. Following a timely application for an extension of time within which to file a petition for a writ of certiorari, this Court granted petitioners until April 4, 1995 to file their petition. A-1.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are:

ARTICLE IV

* * *

Section 4. The United States shall guarantee to every state in this Union a republican form of government . . . .

TENTH AMENDMENT

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

29 U.S.C. § 207(o)

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only --

(A) pursuant to --

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in Clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

STATEMENT OF THE CASE

This case involves the ability of the petitioners, the Missouri Department of Corrections and its director, Dora Schriro, to use their authority under the Fair Labor Standards Amendments of 1985. 29 U.S.C. § 207(o)(1) and (2). There, Congress expressly permitted the Department and other state and local government agencies to use compensatory time instead of cash payments to compensate employees for overtime work.

The Department of Corrections is charged with having and supervising inmates convicted in Missouri state courts of a variety of crimes. Mo. Rev. Stat. Chapter 217. Nearly all of these inmates are felons, many of them are serving sentences for the commission of violent crimes. The respondents are current and former employees of the Department of Corrections. When they began work with the Department of Corrections, they each agreed to accept compensatory time off in lieu of cash payments for overtime work. Pursuant to the agreements regarding compensatory time, the Department credited with compensatory time those employees working overtime. As provided by the Fair Labor Standards Act (FLSA), employees received an hour and a half of compensatory time for each hour of overtime worked. *See* 29 U.S.C. § 207(o)(1).

In practice, the Department found that many employees incurred large amounts of overtime, due to the necessity of keeping critical custody posts sufficiently staffed at all times, even when the regularly scheduled employees were ill or absent for other reasons. Joint Appendix to the U.S. Court of Appeals for the Eighth Circuit ("8th Cir. App.") at 174, 270. Many of those employees, when required to work long hours for a period, would then use the compensatory time to make up for

carrying that burden. But some chose instead to accumulate large amounts of compensatory time.

High accumulations of compensatory time affect the Department's fiscal management in at least two ways. First, a corrections officer, as an employee engaged in a public safety activity, can accumulate only 480 hours of compensatory time. *See* 29 U.S.C. § 207(o)(3)(A). When this cap is reached, additional overtime hours must be compensated by cash payments at time and a half until the officer expends some of the accrued compensatory time. *See id.* Second, when a corrections officer leaves his employment with the Department, the Department must pay cash to the officer for the balance of the accumulated compensatory time. *See* 29 U.S.C. § 207(o)(4). Because of the considerable turnover among corrections officer, this is a frequent occurrence. 8th Cir. App. 175

The Department instituted a policy of overtime control intended to keep compensatory time balances under control. Departmental Procedure No. D2-8.4, III.S provides as follows:

> Federal Overtime Control: Whenever any covered employee accrues one hundred twenty (120) hours of overtime, which converts to one hundred eighty (180) hours of compensatory time, the institution or office personnel representative shall immediately notify the chief administrative officer as well as the departmental personnel officer in central office. The chief administrative officer or their designees shall immediately meet with the employee and discuss a plan to reduce the number of overtime hours accrued by the employee. If departmental needs prevent giving such

> overtime off, the chief administrative officer shall review the employee's scheduling every two weeks, and continuously endeavor to reduce the employee's accrued overtime. A brief report on these efforts will be sent to the departmental personnel officer in central office once a month. All covered employees will not work additional time unless instructed to do so. Covered employees may not volunteer uncompensated overtime work. 8th Cir. App. 148.

Additionally, prison officials circulated a memorandum to corrections employees stating that on

> the 15th of each Month, all Officers with 100 or more hours of Comp time, will submit a 1st and 2nd choice Comp time off request, for 40 hours or more for the following Month. . . . If a request is not received, Comp time off will be scheduled. 8th Cir. App. 173.

In accordance with this policy, some corrections officers who failed to submit their choices for compensatory time off were scheduled to take the time off at times chosen by the Department. No more than eighteen of the respondent corrections employees were required by the Department to use compensatory time when such time off had not been requested by them. 8th Cir. App. 184-86.

The respondent employees filed this lawsuit challenging the Department's policy. In the respondents' view, any policy requiring *use* of compensatory time violated the FLSA. The district court held that the challenged Departmental policy violated the FLSA.

Following the district court's certification of that portion of its order as final pursuant to Fed.R.Civ.P. 54(b), petitioners appealed. The Eighth Circuit affirmed. According to both courts, the decision whether to forever accumulate, rather than use, compensatory time is exclusively within the control of the employee.

REASONS FOR GRANTING THE WRIT

I. **By deciding that the Missouri Department of Corrections violated the Fair Labor Standards Amendments of 1985 by designating time periods within which its employees were required to use accumulated compensatory time the courts below impermissibly ignored the meaning and context of the Amendments, and impinged on the states' ability to manage their budgets and personnel systems in a manner that Congress, acting in consideration of the Tenth Amendment jurisprudence that includes *Garcia*, neither intended nor authorized.**

A. The Eighth Circuit ruling derogates Congress' express enactments allowing states to avoid the use of cash compensation for overtime worked by their employees while fulfilling essential governmental functions, such as those associated with law enforcement.

The Court of Appeals for the Eighth Circuit decided an important question of federal law: whether Congress, in authorizing additional state authority in response to this Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-57 (1985) (*Garcia*), at the same time implicitly gave state employees the unilateral right to restrict the scope of that authority, and thus to partially defeat the entire purpose of the legislation. That decision, if left in place, will affect not just the Missouri Department of Corrections, but agencies of state and local governments throughout the Eighth Circuit, and, unless rejected by other

courts of appeals, throughout the United States. The question of whether state and local public employees have such power is a significant one that should be settled by this Court.

This Court and Congress have struggled with the meaning and application of the Tenth Amendment and the Guarantee Clause of the Constitution in the context of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. In *Garcia*, this Court overruled its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (*Usery*), and thereby permitted the extension of the provisions of the FLSA to the employment practices of state and local governmental entities pursuant to §§ 6(a)(1) and (6) of the Fair Labor Standards Amendments of 1974 (29 U.S.C. §§ 203(d) and (x)). The Court in *Usery* had allowed state and local governments to continue their established practice of paying employees for overtime through the use of compensatory time, rather than cash that would have to be appropriated by state legislatures, and ultimately raised from American taxpayers. *See, e.g.*, S. Rep. No. 99-159, 99th Cong., 1st Sess. 7-8, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 655. The effective result of *Garcia*, absent any legislative change, would have been to impose on the states the very kind of monetary burden that the Court in *Usery* had said was not applicable to the states as employers.

The dramatic change from *Usery* to *Garcia* prompted great concern among state and local governments. They quickly notified Congress of several respects in which they would be injured by the application of the FLSA to their employees. *See id.* Most significant was their grave concern about the substantial increase in payroll costs caused by application of the Act's requirement that overtime hours be compensated in cash at 1.5 times the

regular rate. *Id.* at 8, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 655-56.

Congress, which had excused the federal government from the FLSA requirement that some employees be paid in cash for overtime (*see* 5 U.S.C. § 5543), responded in kind to address the concerns of state and local governments that the immediate and undifferentiated application of the FLSA to their employees would unbearably strain their budgets. The committee reviewing the effect of *Garcia* on government employment found systems of compensatory time off in lieu of payment for overtime hours to "reflect mutually satisfactory solutions that are both fiscally and socially responsible." *Id.*

Following its investigation of the impact of *Garcia*, Congress enacted the Fair Labor Standards Amendments of 1985 (hereinafter referred to as "1985 Amendments"). Pub. L. No. 99-150, 99 Stat. 787. The purpose of the statutory change was clear: "to prevent undue hardship to public employers resulting from the financial burden of paying cash overtime compensation to public employees." *Wilson v. City of Charlotte*, 964 F.2d 1391, 1393 (4th Cir. 1992). As an adjunct to this goal, Congress also sought to provide state and local governments an element of flexibility in their operations. H. Rep. No. 99-331, 99th Cong., 1st Sess. 19 (1985). The decision of the Eighth Circuit, especially since it deals with law enforcement employees, largely defeats that objective.

B. The Eighth Circuit's ruling restrains state and local employers in ways that far exceed the two specific, but limited employee protections found in the 1985 Amendments.

In the 1985 Amendments, Congress authorized state and local governments to provide, in lieu of cash overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of overtime work. 29 U.S.C. § 207(o)(1). In doing so, Congress included two specific, limited means of protecting state employees. Neither of those protections are directly implicated here. What the Eighth Circuit did was to derive a third protection, without statutory authority, and without adequately considering either Tenth Amendment concerns or the purpose of the 1985 Amendments.

The first protection is imposed before the employee works overtime. Congress specified that compensatory time can be provided only if the public employees agree to this arrangement either as part of a collective bargaining agreement, if applicable, or in some other agreement with the employer made before they work any overtime. 29 U.S.C. § 207(o)(2). Employees must be aware, prior to working overtime (and typically, prior to accepting a position) that they will receive compensatory time, rather than cash compensation for overtime work.

The second employee protection relates to the use of compensatory time, after it has been earned. For the employee, receiving compensatory time in lieu of cash overtime would be an illusory benefit if there were no opportunity to actually use the compensatory time. Congress used two specific limited approaches to ensure that the benefit would be real, *i.e.*, that the employees

would not be given compensatory time, then denied the opportunity to actually use it.

Congress included in the 1985 Amendments a strongly worded assurance that the employees can actually *use* the compensatory time that they earn. The employer cannot deny an employee the opportunity merely because of inconvenience. Rather, the employee must be permitted to *actually use* the overtime so long as "use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5).

Congress then set out two financial penalties to be suffered by the employer who did not find ways to accommodate employees' need to make up for long overtime hours by taking compensatory time off.

Congress set a ceiling on the amount of compensatory time that could be "banked," thus establishing that if an employer failed to work out a means for an employee to use compensatory hours within a reasonable period, the employer would have to start paying cash overtime. Such an employer would thus lose the benefit of the 1985 Amendments. Under that statute, public employees engaged in public safety, emergency response, or seasonal activities may not accrue more than 480 hours of compensatory time (320 hours of actual overtime worked). 29 U.S.C. § 207(o)(3)(A). Public employers engaged in other activities may not accrue more than 240 hours of compensatory time (180 hours of actual overtime worked). *Id.* This scheme recognized the additional flexibility state and local employers required as to law enforcement personnel. Congress also acted to prevent an employer from avoiding responsibility because of the termination, voluntary or not, of the employee: accrued compensatory time must be paid off in cash when a public employee leaves his or her governmental employment. 29 U.S.C. § 207(o)(4).

Neither the district court nor the court of appeals found any violation of these specific provisions.

As authorized by the 1985 Amendments, the Missouri Department of Corrections and its former director, Dick D. Moore, the petitioners in this case, entered into agreements with Corrections employees, including over 2000 corrections officers, to accept compensatory time in lieu of monetary payment for overtime work. Thus the district court found that the agreement requirement found in 29 U.S.C. § 207(o)(1) had been met. A-25 - A-33.

The district court also found that except in isolated instances not pertinent here, the Department of Corrections permitted employees to use the compensatory time unless doing so would unduly disrupt Department operations, thus complying with 29 U.S.C. § 207(o)(5). A-38 - A-39.

The district court did not find any instance in which an employee had "banked" in excess of the statutory maximum, but was not subsequently paid cash for overtime worked, as required by 29 U.S.C. § 207(o)(3)(A). Nor did the court find any instance in which an employee who was terminated was not monetarily compensated for compensatory time that he had been unable to use prior to his departure, as required by 29 U.S.C. § 207(o)(4).

The district court and the court of appeals thus found no violation of the law as expressly written by Congress. The employees agreed up front to accept compensatory time, and they were given an opportunity to use the compensatory time they earned. But the courts below inferred a third, new right for state employees nowhere found in FLSA: a right *not to use* compensatory time. That decision imposes restrictions on state and local governments that are of the precise nature that the 1985 Amendments were designed to eliminate, and does so without regard for the Tenth Amendment jurisprudence and

legislative history that are so critical to understanding the meaning of the FLSA as it now applies to the states.

Because the Eighth Circuit's analysis inappropriately establishes a rule that lower courts are free to redefine the post-*Garcia* law to stretch the obligations of the states beyond those endorsed by Congress, and because of the considerable impact that the Eighth Circuit rule has upon thousands of governmental units, this Court should hear this appeal.

C. The decision of the Eighth Circuit creates new rights for state employees that were never authorized by Congress and that are inconsistent with the context and history of the 1985 Amendments.

The issues decided by the court of appeals arose not from employees' efforts to *use* compensatory time (the issue considered and decided by Congress), but from their efforts *not to use*, or to "bank" large amounts of compensatory time. In practice, the Department found some corrections officers accruing high balances of compensatory time through a combination of two factors.

First, the Department faces the necessity of calling in officers to work overtime when other officers are sick or absent for other reasons. Unlike many places of employment which can make do with available staff when absences occur, prisons must run at or very near full staffing levels of custody officers to provide adequate security to the inmates and employees in all areas of the prison and to the general public outside the facility. Missing officers mean less surveillance of a criminally-disposed population, as well as less manpower in the event violence erupts. When corrections officers are at their assigned stations, and relief officers do not timely appear --

whether because the relief officers become ill, are called away or reassigned because of an escape, riot, or other emergency, or for any other reason -- the officers must remain at their posts. Some replacement officers are always on duty to cover for routine absences, but no corrections facility can fund sufficient relief officers to cover for every eventuality.

The issue presented here does not arise, of course, merely because corrections officers work overtime. Congress anticipated that there would be such overtime, and gave employees the right to get mental and physical relief from long hours by taking time-and-a-half compensatory time off. The problem here arises because some corrections officers choose not to use, but to perpetually "bank" the compensatory time. The new rule inferred by the Eighth Circuit encourages those officers to work extra hours and then to decline the opportunity to take time off to recover from the mental and physical fatigue that such work causes.

High accumulations of compensatory time adversely affect the Department's fiscal management in at least two ways, as a result of the methods, identified above, by which Congress has chosen to penalize employers who do not permit the use of compensatory time. First, once a corrections officer reaches the cap of 480 hours of accumulated compensatory time, the Department must pay cash to the officer at time and a half for any additional overtime he or she works until the officer expends some of the accumulated compensatory time. Second, corrections officers have historically high turnover rates. 8th Cir. App. 175. When an officer resigns or is terminated from his job, the Department must pay cash to the officer for his or her accumulated compensatory time.

If state and local government employers were able to come up with immediate and unlimited infusions of cash, the choice by employees to perpetually "bank" rather than

use compensatory time might not be a problem. But this rapidly becomes a problem because of the severe budgetary constraints that affect the Department of Corrections and other state agencies nationwide. As the number of employees "banking" time and approaching the 480 hour limit grows, the Department is threatened with the choice among discriminating in overtime assignments against those with large compensatory time balances, leaving critical posts unoccupied, or incurring expenses for which appropriations have not been made. This last option is largely illusory for most states, which, like Missouri, have balanced budget requirements. Mo. Const. art. III, § 37. Thus the Department, other Missouri state agencies, and other agencies in other states, counties, and municipalities have instituted policies of overtime control intended to keep compensatory time balances at a minimum.

Under the Department's reasonable policy, prison officials meet with employees with accrued compensatory time of 180 hours or more to discuss a plan to reduce this balance. Prison administrators also review the schedule every two weeks to continuously endeavor to reduce accrued overtime. Additionally, prison officials circulated a memorandum to corrections employees stating that those "with 100 or more hours" of accumulated compensatory time are to submit requests for times at which they will use some of that compensatory time during the succeeding month. Those few corrections officers who continue to fail to submit their choices for compensatory time off are scheduled to take the time off at times chosen by the Department. Through this approach, employees are allowed to use their compensatory time, as Congress contemplated, and the Department is allowed to retain the critical flexibility that Congress, acting in response to *Garcia*, intended state agencies to have.

The question of whether a public employer violates the FLSA by requiring employees, perhaps against their wishes, to use portions of their accrued compensatory time during designated time periods is one of first impression. The issue was not specifically addressed by the FLSA and was not discussed in the Congressional debates and reports on the 1985 Amendments to the FLSA. The resolution of the question by the Eighth Circuit is inconsistent with the entire purpose of the 1985 Amendments to the FLSA.

The enactment of 29 U.S.C. § 207(o) was in all respects a reaction to this Court's decision in *Garcia*. So long as *Usery* was the law, Congress remained comfortable in having states exempted from FLSA coverage by virtue of constitutional law as it was then understood. Once this Court held in *Garcia* that understanding was wrong, Congress felt compelled to take action to preserve the financial integrity and employee management flexibility that had previously been assigned to the states.

Thus Congress' fundamental purpose in authorizing state and local governments to provide compensatory time to employees for overtime work was to soften the financial blow governments would feel were they subject to full application of the FLSA's general requirement that overtime work be compensated with cash payments at a premium rate. *Wilson*, 964 F.2d at 1393; S. Rep. No. 99-150 at p. 8, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 655-56; H. Rep. No. 99-331, at p. 18. Congress recognized that the change made by virtue of the constitutional reinterpretation in *Garcia* "could affect millions of taxpayers, forcing them to endure a loss in vital public services, or a burdensome increase in taxes." 131 Cong. Rec. S14,047 (daily ed. October 24, 1985) (statement of Sen. Metzenbaum). Absent a statutory change, states and local governments would have been required to spend "[l]iterally hundreds of millions of dollars annually . . . for

no additional service." 131 Cong. Rec. S14,049 (daily ed. October 24, 1985) (statement of Sen. Wilson). Congress "sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations." S. Rep. No. 99-159, at p. 11, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 659. *See also* H. Rep. No. 99-331, at p. 19 (1985). Congress acted to protect public employees, but at the same time Congress prevented states from having to choose whether to "increase taxes substantially to maintain exactly the same level of service or, failing to do that, [to] suffer a marked reduction in the level of service that they provided to their citizenry." 131 Cong. Rec. S14, 049 (daily ed. October 24, 1985) (statement of Sen. Wilson).

The decision of the Eighth Circuit resurrects that Hobson's choice and derogates the carefully crafted balance Congress struck between employee and employer needs. If the decision is permitted to stand, the Missouri Department of Corrections must either reduce its staffing levels, thus increasing dangers to the public, or obtain additional appropriations, requiring the imposition of additional taxes. Under the Eighth Circuit rule, that choice is forced upon the state not because of any express Congressional decree, but because employees have an unarticulated, unfettered, judicially-created right -- never expressed by Congress -- to "bank," not use, compensatory time.

Neither the 1985 Amendments nor the congressional reports and debates reflect that Congress foresaw that public employees would choose not to use the compensatory time benefit that Congress ensured through passage of the 1985 amendments. Nothing in this Court's decisions in *Usery* and *Garcia* suggests that Congress would have endorsed the view that employees themselves could have unilateral authority to "bank" time indefinitely, and thus to themselves impose on public employers the precise fiscal problems

relating to cash payment of overtime that the 1985 Amendments were meant to resolve. Once an employee makes that choice (assuming he remains employed by the Department long enough to accumulate a large compensatory time "bank"), he eliminates "the flexibility [state and local governments] need to operate without going into the red." 131 Cong. Rec. S14,048 (daily ed. October 24, 1985) (statement of Sen. Metzenbaum). *See also, e.g., id.* at S14,054 (statements of Sen. Nickles and Sen. Bingaman); 131 Cong. Rec. H9239 (daily ed. October 28, 1985) (statement of Rep. Hawkins). There can be no argument that such flexibility was a critical part of the legislative purpose. *See, e.g.,* 131 Cong. Rec. H9917 (daily ed. November 7, 1985) (statement of Rep. Murphy) (legislation permits "handling the schedule of their [the states'] employees as they deem fit").

D. The Eighth Circuit's rule violates a cardinal rule of statutory construction in an area where, because of Tenth Amendment concerns, courts should be wary of treading.

By denying to public employers the option of implementing a plan for mandatory use of compensatory time because Congress was silent as to this specific practice, the court of appeals violated the principle of statutory construction that "Courts cannot supply omissions in a statute." *Lewis, Roca, Scoville & Beauchamp v. Inland Empire Ins. Co.*, 259 F.2d 318, 323 (10th Cir. 1958). This Court framed the principle in *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951): "Congress expresses its purposes by words. It is for us to ascertain - neither to add nor to subtract, neither to delete nor to distort."

The Eighth Circuit's ruling that the FLSA forbids state and local governmental employees from establishing

mandatory use plans impermissibly adds a prohibition to the FLSA that does not exist in the statute. In doing so, it is inconsistent with this Court's decision in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1985). In that case, purchasers of securities successfully prosecuted an action for fraudulent securities sales as a violation of § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j). 459 U.S. at 378-79. Section 10(b), which generally provides that deceptive securities practices are unlawful, has long been recognized as creating an implied private right of action. *Id.* at 380. On appeal, the defendants urged that the purchasers were barred from proceeding under § 10(b) because § 11 of the 1933 Securities Act (15 U.S.C. §77k) specifically provided a private cause of action for purchasers of securities alleging fraudulent sales practices. *Id.* at 380-81. The defendants' contention apparently was that the remedy provided in § 11 of the 1933 Act was intended by Congress to be the sole remedy for the specific type of fraudulent activity prohibited by that Act, and, therefore, that no suit alleging this specific type of conduct could be maintained under § 10(b) of the 1934 Act. This Court, following an analysis of the legislative purposes of the Acts, held that the availability of an express remedy under § 11 of the 1933 Act did not preclude defrauded purchasers from proceeding under § 10(b) of the 1934 Act. That same analysis, properly applied here, leads to a result precisely contrary to that reached by the Eighth Circuit.

To so thoroughly ignore Congress' delicate balancing of employee and employer interests, ensuring that employees can actually use compensatory time but that employers will retain the flexibility necessary to continue effective governmental operations at an acceptable cost, is an error made particularly egregious by the Tenth Amendment context in which this case and its predecessors arose.

Indisputably, the imprisonment of violent criminals is an attribute of state sovereignty, which would have been critical had *Usery* remained the law. But even after *Garcia*, questions of states' rights cannot properly be ignored. The result of the *Garcia* holding may be that the members of Congress "are the sole judges of the limits of their own power." *Garcia*, 469 U.S. at 567 (Powell, J., dissenting). But where, as here, the members of Congress have not enacted legislation that says what the Eighth Circuit has now decreed, there ought to be a presumption that the Congress, to reiterate the word used repeatedly by the members who supported the 1985 FLSA amendments, has ensured that the states (*not* their employees) have retained the "flexibility" that is essential in delivering public services without bankrupting cities, towns, or taxpayers.

Even critics of *Usery* have expressed the view that this court should continue to limit congressional intrusion into state sovereignty. *See, e.g.*, Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 111-13 (1985). Similarly, Professor Tribe concludes that the Court retains responsibility to protect the states from certain forms of federal interference. "The real business of preserving federalism" is "protecting the structure of state government from federal intrusion." L. Tribe, American Constitutional Law, §§ 5-23, at 396 (2d ed. 1988).

Recently, this Court has indicated that the Tenth Amendment retains some vitality in limiting acts of Congress applicable to the states. In *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991), the Court recognized that under the Supremacy Clause, "Congress may impose its will on the States" as long it acts under powers granted by the Constitution. Because of the "extraordinary nature" of this power, however, the Court assumed that Congress would not exercise it lightly. *Id.* Thus, when a congressional

enactment would interfere with fundamental decisions of states acting as sovereigns, and thereby "upset the usual constitutional balance of federal and state powers," the intent of Congress to interfere must be plain.

This Court emphasized in *Gregory* the continuing vitality of state sovereignty:

> This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Id. at 2401. Congress amended the FLSA, after *Garcia*, so as not to interfere unnecessarily with the states' sovereign powers by removing the flexibility that is essential to providing public services at an acceptable cost. The rule announced by the Eighth Circuit "readily interferes" with that flexibility in a way that Congress did not endorse. This Court should hear this case to declare not only that Congress did not make such an endorsement, but also to make clear that when working on the fringes of Tenth Amendment jurisprudence, in an area where Congress has expressly chosen not to "readily interfere" with state operations, it is not the place of the lower courts to do so.

II. The decision of the Eighth Circuit conflicts with another judicial decision that recognized that nothing in the Fair Labor Standards Act prohibits state and local government employers from requiring the timely use of compensatory time.

Not all lower courts have accepted the responsibility, assumed by the Eighth Circuit, of creating new rights not articulated by Congress in the FLSA. The precise question

at issue here was recently presented to the U.S. District Court for the Eastern District of Louisiana in *American Federation of State, County and Municipal Employees, Council 17 v. Louisiana*, 1 Wage & Hour Cas.2d (BNA) 1541, 1994 WL 86679 (E.D. La. March 4, 1994). But the district court there correctly held that the construction of the FLSA adopted in this case was without support in the law.

The Louisiana plaintiffs sought summary judgment, claiming that "the State's practice of first exhausting compensatory time that an employee has accumulated after receiving a request for annual leave, before deducting time from annual leave that an employee has accrued, violates provisions of the FLSA, 29 U.S.C. § 207(o)." 1994 WL 86679 at *3. The court denied that motion, observing, correctly, that there is "no provision of the FLSA or Louisiana law that, either expressly or impliedly, supports their argument." *Id.* The decision of the Louisiana court cannot be reconciled with the decision at issue here. The Eighth Circuit has held that employees are able to unilaterally dictate whether they will ever use the compensatory time they earn. That rule, if adopted, would require invalidating the policy of the Louisiana Department of Health and Hospitals just as it led to the invalidating of the efforts of the Missouri Department of Corrections to utilize compensatory time as authorized by Congress in the wake of *Garcia*.

This Court should hear this case in order to resolve that conflict and to give all fifty states and their thousands of political subdivisions clear guidance as to whether, in ensuring that their employees could use compensatory time, Congress severely restricted the flexibility of the states to make effective use of the compensatory time option.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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